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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1968

NO. 1330

RAYMOND CLARK, Admr. of the Estates of SANDRA CLARK, Decd. and REBECCA CLARK, Decd.,
Petitioner

v.

KENNETH B. ATER, ESQ., and
JOSEPH A. McVAY, ESQ.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA AND APPENDIX

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NO. .....

RAYMOND CLARK, Admr. of the Estates of SANDRA CLARK, Decd. and REBECCA CLARK, Decd.,
Petitioner

v.

KENNETH B. ATER, ESQ., and
JOSEPH A. McVAY, ESQ.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Raymond Clark, Administrator of the Estate of Sandra Clark, Decd. and of the Estate of Rebecca Clark, Decd., respectfully prays that a writ of certiorari issue in the above captioned case directed to the Supreme Court of Appeals of the State of West Virginia to review that Court's Order (App. ....) dated February 17, 1969, refusing appeal and supersedeas.

CITATION TO OPINION BELOW

The Order of the Supreme Court of Appeals of West Virginia sought to be reviewed herein was accompanied by no opinion, and is as yet not reported.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. Sec. 1257 (3), the Fourteenth Amendment of the Constitution, Sec. 1, the due process and equal protection clauses; the Fifth Amendment, due process clause; and Art. I. sec. 10, clause 1, prohibiting impairment of contract.

The Order of the Supreme Court of Appeals of West Virginia sought to be reviewed herein was dated and entered February 17, 1969. The time for filing this Petition for Writ of Certiorari, therefore, expires on May 19, 1969.

STATEMENT OF QUESTIONS INVOLVED

1. Where, unknown to Petitioner, his state court actions are dismissed because of Respondent's failure to set same for trial; and within 7 months after discovery of said dismissals, suit is lodged against Respondent, should such action be dismissed as being barred by the state tort limitations statute, held applicable from date of October 25, 1965, when the original default dismissals were entered?

Affirmed below.

2. Does the judgment of the Circuit Court of Cabell County, West Virginia discriminatorily and unequally apply the tort limitations statute, contrary to the provisions of the United States Constitution?

Unanswered below.

3. Does the discriminatory application of the tort limitations statute to Petitioner's complaint violate the Contract clause of Art. I sec. 10, clause 1, the Fifth Amendment and the Fourteenth Amendent of the Constitution?

Unanswered below.

STATEMENT OF THE CASE

Petitioner, as administrator of the Estate of Sandra Clark, Decd., and as administrator of the Estate of Rebecca Clark, Dęcd., employed Attorney Kenneth B. Ater to enter wrongful death and survival actions in West Virginia. Ater is an Ohio attorney. Ater employed Attorney Joseph A. McVay, a West Virginia attorney, to file said actions. After entering two actions in Wayne County Circuit Court, West Virginia, McVay failed to comply with the lcoal court rule requiring same to be by him ordered on a trial list and both actions were dismissed on October 25, 1965 by reason of said defaults. No attempt was made by either attorney to open the default decrees; and neither notified Petitioner of the entry of same. In July of 1967, Petitioner inquired of the Clerk of the Wayne County, West Va. Circuit Court as to the date of trial of said actions and was for the first time informed of the dismissal decrees. He could not locate McVay who was out of the State, and, in December, 1967, a federal action was filed at Civ. Ac. No. 6565 against the respondents in the United States District Court at Columbus, Ohio. Service on McVay was not obtained, and, immediately upon learning of his return to Huntington, West Virginia, on February 18, 1968, a state court action was separately filed and service obtained on McVay through the Circuit Court at Cabell County, West Virginia. McVay's motion to dismiss the complaint, based, inter alia, on the tort statute of limitations from the date of the default dismissals, was sustained. Timely petition for Writ of Error and Supersedeas to the Supreme Court of Appeals of West Virginia was made; and, on February 17, 1969, an order entered refusing same.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT

1. The Supreme Court of Appeals of the State of West Virginia, by Refusing the Writ of Error, Denied Petitioner Due Process of Law in Seeking a Trial to Enforce His Contract Against Respondent McVay.

Even as to those states which hold that limitations statutes start running from the date of the default, and not from the date of discovery thereof, "the gist of the action is the attorney's breach of contract. . . ."; 54 C.J.S. Limitation of Actions, par. 135 (c) p. 57.

Obviously, if the "obligation of contract" is unenforceable, the Constitution would afford no protection therefore, and the integrity thereof would be rendered nugatory.

". . . incompatible doctrines of local law must give way to principles of federal . . . law"; *Local 174, Teamsters, etc. v. Lucas Flour Co.,* 369 U.S. 95.

No statute of West Virginia declares that an employment contract of an attorney may be enforced only under the tort statute of limitations. By its novel, first impression decision, the Circuit Court has evaded the enforceability of Petitioner's contract by relegating him to the shorter tort period of limitations, rather than the more than adequate contract statute, elsewhere uniformly held applicable.

The West Virginia Court decision herein arbitrarily circumvents the mandate of the "obligation of contract" clause of Art. I, sec. 10, clause 1 of the Constitution, which has been held to embrace the remedy for enforce-

ment of the contract as well as for redress of injury for nonperformance; *State ex rel. Porterie v. Walmsley,* 162 So. 826, 183 La. 139, appeal dismissed, 296 U.S. 540, reh. den. 296 U.S. 663.

2. The Summary Dismissal of the Complaint Without Leave to Amend and Without Trial in the State Court on the Tort Limitation Statute, Arbitrarily Deprives Petitioner of a Remedy or Trial by Jury on His Contract Employing Respondent McVay.

Although the within case is between private parties, the decision is arbitrarily and capriciously in violation of settled principles of law, and contrary to the undisputed facts as to be in violation of the Fourteenth Amendment; *Postal Telegraph Cable Co. v. Newport, Ky.,* 247 U.S. 464; *Williams v. Tooke,* 108 F2d 758, cert. den. 311 U.S. 655.

It is more than a merely "wrong decision"; it affects the very foundation of the juridical process. The impossibility of meeting the burden imposed on litigants in the decision sought to be reviewed challenges the imagination: in effect, only lawyers can be litigants — or, each litigant would be required to employ a second lawyer to check on the first, a third to check on the second, etc.; and the decision makes it possible for an attorney to ". . . chart the strategy to avoid liability for his own negligence" condemned in *Siegel v. Kranis,* 288 NYS2d 831 (App. Div., 1968); The Commencement of the Statute of Limitations in Legal Malpractice Actions —The Need for Re-Evaluation: *Eckert v. Schaal,* 15 UCLA L. Rev. 230, 1967.

Reasons Relied On For Issuance of The Writ.

In effect, the decision creates a special immunity for lawyers, permitting them to violate their contracts of employment, conceal the violations until the tort limitations period expires, and escape liability which would be enforceable against all other classes of citizens.

Moreover, in West Virginia no right of appeal exists, and the arbitrary and capricious establishment of lawyer immunity by the Circuit Court decision has now the implied approval of the Supreme Court of Appeals by its refusal to grant a writ of error.

The Petitioner has been denied his right to be heard on the death cases by the default of his attorneys; and he has been deprived of his right to be heard in a court of law on his malpractice action by an arbitrary application of a state tort statute; while the Supreme Court of Appeals arbitrarily refuses to invoke its power to review and correct the injustice.

Unless this Honorable Court opens the door to the West Virginia courthouse for the Petitioner, Petitioner will have been discriminatorily deprived of his "right to be heard" in an impartial tribunal, contrary to the established principles here declared; *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306; *Anderson Natl. Bank v. Luckett, Ky.,* 321 U.S. 233; *Ownbey v. Morgan,* 256 U.S. 94; *Postal Tel. Cable Co., v. City of Newport, Ky.,* 247 U.S. 464.

It has wisely been here held that where a state court or agency action, under state law may be used "to ignore alleged federal constitutional error", certiorari was granted; *Cooper v. State of California,* 386 U.S. 58.

3. This Is a Cause of Extreme Public Importance to the Citizens and Litigants of West Virginia, in That Unequal Application of the State Tort Statute Discriminates in Favor of Lawyers as Against Physicians.

The Supreme Court of Appeals of West Virginia, in *Hundley v. Martinez,* 158 S.E.2d 159 (Dec. 12, 1967) had adopted the rule now generally applied with respect to medical malpractice cases, holding that the tort statute begins to run from date of discovery of the offense. Although the contract of employment of a physician is similar to that of a lawyer in that each is hired as a special agent for performance of professional service, the tort statute, as applied to the medical profession, does not work an unusual hardship which could deny a basic right or remedy to the victim of the wrong. Moreover, the medical malpractice victim has a greater chance of knowing or discovering the hurt to himself than does the civil litigant totally unaware of court rules. The requirement that the litigant make himself aware of the lawyer's fault, so as to sue within the short period of tort limitation statutes, when as the public already knows that case backlogs may be the accepted reason for delay in trials, thus masking the lawyer's fault in the mind of the client, is a gross inequality in application of the tort statute. Such inequity is contrary to the mandate of the federal law and the policy thereof: *Old Colony R. Co. v. Assessors of Boston,* 309 Mass. 439; *Chambers v. State of Florida,* 309 U.S. 227; Fourteenth Amendment, equal protection clause.

It is especially repugnant to the sense of justice and right that a litigant, wronged by a lower court's

establishment of a rule of law contrary to the basic requirements of fair play and equity demanded of our juridical process should be denied another such right common to the citizens of the land, and inherent to the federal system, the RIGHT of appeal. It is revolting to the American spirit that in its demand for justice, it is required to seek favor, grace or permission to be heard in the discretion of a court of appeals.

The Supreme Court of Appeals likes to believe that it is made in the image of this Honorable Court, and like it, possesses the same broad discretion in granting or refusing writs. Obviously, what is lacking in the comparison, is an intermediate court of appeals system, on which the federal law relies to correct errors of trial courts, and into which litigants have a RIGHT to enter with their causes.

When the Constitution was written, equality of treatment by the law was intensely desired. It is hardly imaginable that the writers ever equated "equal protection of the laws" with "equal denial of protection", which is the result of the decisions sought to be reviewed herein.

CONCLUSION

Wherefore, it is respectfully prayed that a writ of certiorari be granted, and the Order of the Supreme Court of Appeals of West Virginia, denying review and reversal of the arbitrary and capricious ruling of the Circuit Court of Cabell County, be reversed with a procedendo.

HARRY ALAN SHERMAN, Esq.,
186 Carlton House,
Pittsburgh, Penna. 15219

STEPHEN P. MEYER, Esq.
402 Charleston National Bank Bldg.,
Charleston, West Virginia
Of Counsel

APPENDIX

IN THE CIRCUIT COURT
OF CABELL COUNTY, WEST VIRGINIA

RAYMOND CLARK, Administrator of the Estate of Sandra Clark, Deceased and of the Estate of Rebecca Clark, Deceased, Plaintiff
v.
KENNETH B. ATER, ESQ. and JOSEPH A. MCVAY, ESQ., Defendants

Civil Action No. 18652

Complaint

Raymond Clark, Administrator of the estate of Sandra Clark, deceased and Rebecca Clark, deceased, brings this suit against the defendants above named upon the following cause of action:

1. Plaintiff is the duly appointed administrator of the estates of Sandra Clark, deceased and Rebecca Clark, deceased, and is a citizen and resident of the State of West Virginia, residing in Huntington, West Virginia..

2. Defendant Kenneth B. Ater is a citizen and resident of the State of Ohio, residing in Chesapeake, Ohio.

3. Defendant Joseph A. McVay, is a citizen and resident of West Virginia, residing in Huntington, West Virginia at 615 13th Avenue therein.

4. At all times pertinent, defendant Joseph A. McVay was a duly licensed and practicing lawyer in

the State of West Virginia, and defendant Kenneth B. Ater was a duly licensed and practicing lawyer in the State of Ohio.

5. At all times pertinent defendants were employed by plaintiff in his representative capacity to enter a civil action or actions against one William J. Adkins for the wrongful deaths of Sandra Clark, deceased and Rebecca Clark, deceased, who were minors and guests in the Adkins automobile which was caused to crash into a concrete flood wall killing said decedents, and for rights of survivors, particularly the parents of said decedents, under the laws of West Virginia.

6. On or about July 1, 1963, defendants did cause to be filed a complaint in the Circuit Court of Wayne County, West Virginia, at Civil Action No. 1133 therein, and summons to be issued on the same date, on behalf of the Estate of Rebecca Clark, deceased.

7. On or about July 1, 1963, defendants did cause to be filed a complaint in the Circuit Court of Wayne County, West Virginia, at Civil Action No. 1134, and summons to be issued on the same date, on behalf of the Estate of Sandra Clark, deceased.

8. Answers were duly filed to both of the complaints aforesaid, and the actions were thereupon ready for issue and pre-trial and trial proceedings as provided by the West Virginia and Wayne County rules of practice.

9. Contrary to the obligation of defendants to exercise such skill, care and diligence required of them in such matters, defendants did fail and neglect to process

said cases, and did only permit or obtain continuances thereof.

10. By reason of the willful and wrongful negligence and malpractice of defendants as aforesaid, the Circuit Court of Wayne County, West Virginia, did on October 25, 1965, enter orders of Court in each of the said proceedings dismissing same.

11. Defendants have wilfully, wrongfully and negligently failed to advise plaintiff of the orders of dismissal as aforesaid; and plaintiff did not discover that said orders had been entered until on or about July 20, 1967, when he did cause private inquiry to be made of the Clerk of the said Circuit Court of Wayne County, West Virginia.

WHEREFORE, plaintiff in his representative capacity as Administrator of the Estate of Sandra Clark, deceased, demands judgment from the defendants, jointly or severally, in the sum of Ten Thousand Dollars ($10,000.00) as Compensatory damage.

WHEREFORE, plaintiff in his representative capacity as Administrator of the Estate of Rebecca Clark, deceased, demands judgment from the defendants, jointly or severally, in the sum of Ten Thousand Dollars ($10,000.00) as Compensatory damage.

WHEREFORE, plaintiff in his representative capacity as Administrator of the Estate of Sandra Clark, deceased, demands judgment against the defendants, jointly or severally, in the amount of Fifty Thousand Dollars ($50,000.00) as Punitive damages.

WHEREFORE, plaintiff in his representative capacity as Administrator of the Estate of Rebecca Clark, de-

ceased, demands judgment against the defendants, jointly or severally, in the amount of Fifty Thousand Dollars ($50,000.00) as Punitive damages.

STEPHEN P. MEYER
Attorney at Law
402 Charleston National Bank Building
Charleston, West Virginia

HARRY ALAN SHERMAN
Attorney at Law
186 Carlton House
Pittsburgh, Pennsylvania 15219

IRWIN BARKAN
Attorney at Law
8 East Long Street
Columbus, Ohio
Attorneys for Plaintiff

A TRUE COPY

ATTEST: R. E. Lee Taylor, Clerk, Circuit, Common Pleas, & Domestic Relations Courts of Cabell County, West Virginia.

[SEAL] By NELL RUTHERFORD
Deputy Clerk

Notice of Hearing of Motion

TO: Stephen P. Meyer
402 Charleston National Bank Building
Charleston, West Virginia

Please take notice that the undersigned will bring the attached motion to dismiss of the defendant, Joseph A. McVay, on for hearing before the Circuit Court of Cabell County, West Virginia on the 29th day of March, 1968, at 9:30 a.m. E.S.T. of that day or as soon thereafter as counsel may be heard.

WILLIAM C. BEATTY
of Counsel for defendant,
Joseph A. McVay
P. O. Box 2185
Huntington, West Virginia

HUDDLESTON AND BOLEN
Counsel for Defendant,
Joseph A. McVay

A TRUE COPY

ATTEST: R. E. Lee Taylor, Clerk, Circuit, Common Pleas, & Domestic Relations Courts of Cabell County, West Virginia.

[SEAL]

By NELL RUTHERFORD
Deputy Clerk

Motion to Dismiss of the Defendant, Joseph A. McVay

The defendant, Joseph A. McVay, moves the Court to dismiss this action as to him because the complaint fails to state a claim upon which relief can be granted for the following reasons:

1. The complaint does not allege facts which show the following in regard to the original actions instituted in the Circuit Court of Wayne County, West Virginia:

(a) That such actions were good and valid causes of action for negligence upon which recovery would have been had.

(b) That but for negligence or wrongful conduct on the part of this defendant judgments would have been recovered in each action and collection made thereon.

(c) That the defendant in such actions was solvent.

2. The complaint shows on its face that the matters and things complained of occurred in a court of public record on October 25, 1965, this being a period in time more than one (1) year next before the institution of this action and also more than two (2) years before the institution of this action, said action now being barred by the statutes of limitations of this state.

3. The plaintiff as administrator of the estates of Sandra Clark and Rebecca Clark, both deceased, has no standing in his administrative capacity as personal representative of such estates to institute this action or to make any recovery herein, the original actions instituted in the Circuit Court of Wayne County, West

Virginia being actions for alleged wrongful death and not a part of the estates of the two decedents.

4. There can be no recovery for punitive damages as requested in the complaint because the original actions asserted in the Circuit Court of Wayne County, West Virginia were each subject to a statutory limitation of $10,000.00 as to possible recovery and the amounts requested in each claim asserted herein each exceed that amount.

5. The plaintiff has failed to join those persons who would receive the distribution of the personal estate of plaintiff's decedents, such persons being the only persons who could take the proceeds of the actions for wrongful death of such decedents and being further indispensible parties to this action.

WILLIAM C. BEATTY
of Counsel for defendant,
Joseph A. McVay
P. O. Box 2185
Huntington, West Virginia

HUDDLESTON AND BOLEN
Counsel for Defendant,
Joseph A. McVay

CERTIFICATE OF SERVICE

The undersigned attorney for the defendant, Joseph A. McVay, hereby certifies that he served the foregoing notice of motion and the foregoing motion to dismiss of defendant, Joseph A. McVay, upon Stephen P. Meyer, by mailing true copies thereof to him at his last known address, 402 Charleston National Bank Building, Charleston, West Virginia, by depositing the same in the regular manner in the United States mail Huntington, West Virginia on the 7th day of March, 1968.

WILLIAM C. BEATTY

A TRUE COPY

ATTEST: R. E. Lee Taylor, Clerk, Circuit, Common Pleas, & Domestic Relations Courts of Cabell County, West Virginia.

[SEAL] By NELL RUTHERFORD
Deputy Clerk

Notice to Take Depositions

To: William C. Beatty, Esq.
900 First Huntington National Bank Building
Huntington, West Virginia 25722
Counsel for Defendant, Joseph A. McVay

Please take notice that at 10:30 A.M. on the 28th day of March, 1968, the plaintiff in the above entitled action will take the deposition of the defendant, Joseph A. McVay, at the office of Chad W. Ketchum, Esq., Attorney at Law, 419 11th Street, Huntington, West Virginia, upon oral examination before an officer authorized to administer oath, for purposes of discovery and/or trial; said oral examination will continue from day to day until completed. You are invited to attend.

Dated this 16th day of March, 1968.

STEPHEN P. MEYER, ESQ.
402 Charleston National Bank Building
Charleston, West Virginia 25301

HARRY ALAN SHERMAN, ESQ.
The Carlton House
550 Grant Street
Pittsburgh 19, Pennsylvania

CERTIFICATE OF SERVICE

I, STEPHEN P. MEYER, Counsel for the plaintiff, do certify that I have served the foregoing Notice To Take Depositions upon William C. Beatty, Esq., Counsel for the defendant, Joseph A. McVay, by depositing a copy thereof in regular United States Mail, postage prepaid, addressed to him at 900 First Huntington National Bank Building, Huntington, West Virginia, which is his last address known to the undersigned, on this 16th day of March, 1968.

STEPHEN P. MEYER

A TRUE COPY

ATTEST: R. E. Lee Taylor, Clerk, Circuit, Common Pleas, & Domestic Relations Courts of Cabell County, West Virginia.

[SEAL] By NELL RUTHERFORD
Deputy Clerk

Appendix.

Notice of Hearing of Motion

TO: Stephen P. Meyer
402 Charleston National
Bank Building
Charleston, West Virginia.

Please take notice that the undersigned will bring the attached Motion of the Defendant, Joseph A. McVay, To Vacate And Set Aside Notice To Take Deposition of said Joseph A. McVay, on for hearing before the Circuit Court of Cabell County, West Virginia, on the 22nd day of March, 1968, at 9:30 E.S.T. of that day or as soon thereafter as counsel may be heard.

WILLIAM C. BEATTY
of Counsel for defendant,
Joseph A. McVay
P. O. Box 2185
Huntington, West Virginia

HUDDLESTON AND BOLEN
Counsel for Defendant,
Joseph A. McVay

Motion of the Defendant, Joseph A. McVay to Vacate and Set Aside Notice to Take Deposition and to Stay Taking of Deposition of Said Joseph A. McVay.

Defendant moves the Court under Rule 30 of the West Virginia Rules of Civil Procedure to vacate and set aside the notice of taking the deposition of the defendant, Joseph A. McVay, dated March 16, 1968, and stay the taking of such deposition until this Court has had time to consider and pass on the motion of the defendant to dismiss the complaint filed herein because:

(a) Since the matters and things raised in the pending motion to dismiss of the defendant embrace questions of law alone upon which evidence cannot be produced, the taking of such deposition is not pertinent to such motion, is premature, is unnecessary and will lead to needless and undue expenditures of time and costs and undue harassment of the defendant.

(b) If the motion to dismiss of the defendant is successful, there will be no need for the taking of such deposition and to now stay such deposition pending hearing and ruling on the motion may alleviate the need for taking such deposition, thus saving time and costs.

(c) By taking such deposition and taking evidence, plaintiff will necessitate the taking of depositions by defendant and will necessitate general trial preparation prior to the hearing and ruling on the motion to dismiss.

(d) There is now pending in the United States District Court for the Southern District of Ohio at

Cincinnati, Ohio an action by plaintiff against Kenneth B. Ater, who is named as a defendant in this action but has not been served, and it is believed that plaintiff's purpose for taking the deposition of the defendant McVay is for preparation for trial or for obtaining evidence in such action pending in Federal Court in Ohio. These purposes are entirely collateral and not pertinent to this action.

WILLIAM C. BEATTY
of Counsel for defendant,
Joseph A. McVay
P. O. Box 2185
Huntington, West Virginia

HUDDLESTON AND BOLEN
Counsel for Defendant,
Joseph A. McVay
Huntington, West Virginia

CERTIFICATE OF SERVICE

The undersigned attorney for the defendant, Joseph A. McVay, hereby certifies that he served the foregoing notice of motion and the foregoing Motion of the Defendant, Joseph A. McVay To Vacate and Set Aside Notice To Take Deposition and To Stay Taking of Deposition of Said Joseph A. McVay, upon Stephen P. Meyer, by mailing true copies thereof to him at his last known address, 402 Charles National Bank Building, Charleston, West Virginia, by depositing the same in the regular manner in the United States Mail at Huntington, West Virginia on the 18th day of March, 1968.

WILLIAM C. BEATTY

A TRUE COPY

ATTEST: R. E. Lee Taylor, Clerk, Circuit, Common Pleas, & Domestic Relations Courts of Cabell County, West Virginia.

[SEAL]

By NELL RUTHERFORD
Deputy Clerk

Ruling on Motion

This ruling deals with a motion filed on behalf of McVay to dismiss plaintiff's action, filed March 7, 1968, herein. This motion was subsequently argued orally and by briefs before this court.

Service was had only on defendant McVay, Ater being a resident of Ohio and not served in instant action.

It appears from the facts pleaded as set forth in plaintiff's Complaint that the two named defendants are attorneys; that prior to July 1, 1963, they were employed by the plaintiff, Raymond Clark, in his representative capacity as Administrator of the Estates of Sandra Clark and Rebecca Clark, both deceased, to enter civil actions against one William J. Adkins for the wrongful death of Sandra and Rebecca Clark.

It is alleged that on or about July 1, 1963, the defendants filed a complaint in the Circuit Court of Wayne County, West Virginia, in the two separate actions. Thereafter Answers were filed to both of the Complaints. Nothing was thereafter done by the defendants, as attorneys, in either of the actions, and on October 25, 1965, orders were entered by the Court in Wayne County dismissing both actions.

It is for alleged malpractice in allowing these actions to be dismissed that instant Civil Action #18652 is brought in this Court against the two attorneys.

I. Defendant contends that the Complaint fails to sufficiently allege a cause of action for malpractice.

While it appears that our Supreme Court of Appeals has not had occasion to pass on the necessary al-

legations to make a cause of action for malpractice against an attorney, the great weight of authority elsewhere holds that the original action which the attorney is charged with failing to follow through must have been one:

(1) Upon which recovery would have been had.

(2) That but for the wrongful conduct of the attorney, a judgment would have been recovered in the action.

(3) That collection would have been made on that judgment, and

(4) That the defendant in the wrongful death action was solvent.

In point see Johnson vs. Haskins 119 SW (2d) 235 (Mo. 1938); Feldsman vs. McGovern 112 P (2d) 645 (Cal 1941); Veoth vs. McEachen 181 NY 28, 73 NE 488; Maryland Casualty Co. vs. Price 231 F 397 (4th Circuit); and other cases cited in the Feldsman case, supra. Also see Jones vs. Wright 91 SE 265 (Ga. 1917) and Schmitt vs. McMillan 162 NYS 437 (NY 1916).

In Maryland Casualty Co. vs. Price, cited supra (4th Circuit) and having origin in the Southern District of West Virginia, it is held that the complaint must show that the plaintiff suffered damage by reason of the negligence of the attorneys; that had they done what they were employed to do (defend in that case) there would have been no judgment against the plaintiff, or would have been a lesser sum.

An examination of the Complaint in instant case nowhere reveals an allegation or allegations therein

which are required to be pleaded in such cases, viz: that there is no allegation that but for the negligence of the defendants judgment would have been recovered in each action; that collection would have been had thereon, and that the defendant in that action was solvent.

I am of opinion that the complaint must so allege, and it must be proven on the trial. This seems to be the logical requirement in the cases. And the plaintiff here should not be allowed to *profit* from the neglect of his attorneys. In a matter upon which recovery is very uncertain he should not be allowed recovery from his attorneys for their neglect, for a sum in excess of what he could recover in the original case. The amount of the original recovery must be pleaded and proved.

For these reasons I am of opinion to hold that the complaint fails to set forth necessary facts to constitute negligence against the defendant and the complaint must be dismissed.

II. The second point raised on the defendant's motion to dismiss is based on the statute of limitations. The complaint shows that the actions in Wayne County were dismissed on October 25, 1965, because of the negligence of the attorneys. The plaintiff claims to have first learned of the dismissals about July 20, 1967. Instant action for malpractice was instituted February 16, 1968.

Under Code 55-2-12 the statute of limitations is two (2) years from the time the cause of action accrued if it is for damage to property or for personal injuries. It is one (1) year if it be for any other matter, if the other matter be of such a nature that, in case a party die, it could not have been brought, at common law, by or against his personal representative.

I would hold that the statute of limitations commenced to run not when the plaintiff learned of the alleged negligence of the attorney, but rather on the date the suits were dismissed in Wayne County, October 25, 1965.

I would further hold that this action, commenced on February 16, 1968, was barred by the statute of limitations even before it was commenced, whether it be for damages for personal injury or for property damage, or for some act other than personal or property damage, but of such nature that in case a party die it could not have been brought by or against his personal representative.

See Connors vs. Newton National Bank 147 NE (2d) 185 (Mass 1958); Erle vs. Moore's Estate 290 NW 379 (Mich. 1940).

Also see Sanson vs. Sanson 148 W. Va. 603; Barnes vs. Lilly 110 W. Va. 643; Fogle vs. King 132 W. Va. 224; F. B. Myers vs. Steptoe & Johnson 253 F. Supp. 626 (DC 1966).

While the decision herein under points I and II are determinative of this cause and final, this Court will pass on the remaining two points raised.

III. I would hold that since the actions in Wayne County were under the wrongful death statute, and had a statutory limitation on the amounts that could therein be recovered, to allow punitive damages to be recovered in instant action would be to exceed the recoverable amount in the Wayne County actions, and allow the plaintiff to profit from the alleged discretions of these defendants. The plaintiff is entitled to be put, at the

utmost, in the same position as if the contract had not been broken.

IV. I am further of the opinion to hold that the administrator here is entitled to bring a wrongful death action only by virtue of the statute, and then only in a representative status or in the capacity as a trustee; that any money recovered by him would not become funds of the estate but would go to the real parties in interest. Since instant action is not a statutory proceeding but one brought for malpractice for failing to process the statutory action, then it would appear that the real parties in interest, the ones who would have been participants in the judgment in Wayne County, should and must be parties to instant action.

For the reasons above set forth I would dismiss this action.

JOHN W. HEREFORD, Judge
Circuit Court of Cabell
County, West Virginia

At Huntington

May 13, 1968

A TRUE COPY

ATTEST: R. E. Lee Taylor, Clerk, Circuit, Common Pleas, & Domestic Relations Courts of Cabell County, West Virginia.

[SEAL] By NELL RUTHERFORD
Deputy Clerk

This Order Received on the 7 day of June, 1968.

R. E. LEE TAYLOR,
Clerk.

At a regular term of Circuit Court continued and held in and for the County of Cabell, State of West Virginia, at the Court House thereof on the 7th day of June, 1968 the following order was made and entered:

Order

This day came the plaintiff by his attorneys, Stephen P. Meyer and Harry Alan Sherman, and the defendant, Joseph A. McVay by Huddleston and Bolen, his attorneys, and the motion of the defendant, Joseph A. McVay, to dismiss this action came on to be heard, and the Court having heard argument and having considered the briefs of counsel was of opinion to and does hereby grant said motion as shown by a written ruling on said motion by the Court dated May 13, 1968, which ruling is Ordered to be and is hereby filed as a part of the record in this case and it is Ordered that said motion to dismiss be, and the same is hereby, granted, and this action is dismissed as to the defendant, Joseph A. McVay, with costs awarded to said defendant, all of which the plaintiff EXCEPTS and OBJECTS.

Enter: This 7th day of June, 1968.

JOHN W. HEREFORD
Judge

Approved for Entry as to form

STEPHEN P. MEYER
Counsel for Plaintiff

HARRY ALAN SHERMAN
Counsel for Plaintiff

WILLIAM C. BEATTY
Of Counsel for Defendant,
Joseph A. McVay

ENTERED. Circuit Court Civil Order Book No. 12 Page 211 this 7th day of June, 1968.

A TRUE COPY

ATTEST: R. E. Lee Taylor, Clerk, Circuit, Common Pleas, & Domestic Relations Courts of Cabell County, West Virginia.

[SEAL] By NELL RUTHERFORD
Deputy Clerk

Notice

TO: William C. Beatty, Esq.
Attorney at Law
900 First Huntington National
Bank Building
Huntington, West Virginia 25722

You are hereby respectfully notified that the undersigned will, on December 12th, 1968, at 9:30 A.M. or as soon thereafter as may be convenient, present to the Clerk of the Circuit Court of Cabell County, West Virginia, a Petition of the plaintiff for a Writ of Error and Supersedeas to be transmitted to the Supreme Court of Appeals of West Virginia, a copy of which Petition is attached hereto and made a part of this Notice.

STEPHEN P. MEYER, ESQ.
402 Charleston National
Bank Building
Charleston, West Virginia 25301

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Notice on Joseph A. McVay, Esq., by mailing a true copy thereof, by regular United States Mail, to his Attorney, William C. Beatty, at 900 First Huntington National Bank Building, Huntington, West Virginia, 25722 on this 12th day of December, 1968.

STEPHEN P. MEYER

A TRUE COPY

ATTEST: R. E. Lee Taylor, Clerk, Circuit, Common Pleas, & Domestic Relations Courts of Cabell County, West Virginia.

[SEAL] By NELL RUTHERFORD
Deputy Clerk

CLERK'S CERTIFICATE

State of West Virginia
County of Cabell } ss.:

I, R. E. Lee Taylor, Clerk Circuit Court, a court of record in and for the County of Cabell, State of West Virginia, do hereby certify that the foregoing is all of the original record in the Civil Action No. 18652, wherein, Raymond Clark, Administrator of the Estate of Sandra Clark, Deceased and of the Estate of Rebecca Clark, deceased, Plaintiff, vs: Kenneth B. Ater and Joseph A. McVay, defendants, as the same appears of record and in my said office.

Given under my hand and official seal, at Huntington, Cabell County, West Virginia, this the 12 day of December 1968 and in the 106th year of the State.

R. E. LEE TAYLOR, Clerk Circuit Court Cabell County, West Virginia

By: C. P. BOWEN
Deputy Clerk.

A TRUE COPY

ATTEST: R. E. Lee Taylor, Clerk, Circuit, Common Pleas, & Domestic Relations Courts of Cabell County, West Virginia.

[SEAL]

By NELL RUTHERFORD
Deputy Clerk

This Order Received This the 17 day of Feb. 1969.
R. E. LEE TAYLOR, Clerk

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of January, 1969, the following order was made and entered, to-wit:

Raymond Clark, Administrator of the Estate of Sandra Clark, deceased, and of the Estate of Rebecca Clark, deceased vs. Kenneth Ater, Esq., et al.

On a former day, to-wit, December 17, 1968, came the petitioner, Raymond Clark, Administrator of the Estate of Sandra Clark, deceased, and of the Estate of Rebecca Clark, deceased, by Stephen P. Meyer and Harry Alan Sherman, his attorneys, and presented to the Court his petition praying for an appeal from and supersedeas to a judgment of the Circuit Court of Cabell County rendered in this action on the 7th day of June, 1968, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal and supersedeas prayed for is refused.

A True Copy

Attest: GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

ENTERED. Circuit Court Civil Order Book No. 13 Page 205 this 17th day of Feb. 1969.

A TRUE COPY

ATTEST: R. E. Lee Taylor, Clerk, Circuit, Common Pleas, & Domestic Relations Courts of Cabell County, West Virginia.

[SEAL] By NELL RUTHERFORD
Deputy Clerk

Petition of the Plaintiff, Raymond Clark, Administrator, for a Writ of Error and Supersedeas From a Final Order of the Circuit Court of Cabell County, West Virginia

To the Honorable the Chief Judge and Associate Judges of the Supreme Court of Appeals of West Virginia:

The petition of Raymond Clark, Administrator of the Estate of Sandra Clark, decd. and of the Estate of Rebecca Clark, deceased, respectfully represents:

1. By Ruling of May 13, 1968, and by final order thereafter entered thereon, the learned Circuit Court of Cabell County dismissed the action on motion of defendant Joseph A. McVay, Esq., being the only defendant served and within the jurisdiction of the said Circuit Court. The only pleadings before the Circuit Court were the Complaint, defendant's Motion to Dismiss, and written briefs supporting and opposing dismissal. No hearing was had on the merits at any time. The Complaint is for malpractice, for failure of the said defendant to properly process death actions for petitioner's decedents in the Circuit Court of Wayne County, resulting in orders of default dismissals, therein.

2. The learned Circuit Court grounded its order of dismissal below on (a) insufficiency of the complaint; (b) applicability of the tort statute of limitations from the date of dismissals of the Wayne County Court actions, rather than from plaintiff's discovery thereof or the broader contract statute of limitations; and (c) that the real parties in interest rather than the administrator were the only proper parties to assert a cause.

3. That in entering the order of dismissal below, the learned Circuit Court in effect, without reference thereto, denied plaintiff's alternative prayer for leave to amend the complaint, if found to be non-specific in any necessary averment.

PETITIONER'S CONTENTIONS ARE AS FOLLOWS:

A. The learned Circuit Court erred in holding as a matter of law that plaintiff-petitioner's Complaint was insufficient; and if found to be insufficient as to assertion of collectibility of judgment against the defendant in the death actions, that opportunity to have amended the Complaint in that regard should have been afforded to plaintiff-petitioner, before dismissing the case, in accordance with the liberal holdings applicable to amendments.

B. The learned Circuit Court erred in holding that the tort statute of limitations is applicable to malpractice suits of the type here involved; and

C. The learned Circuit Court further erred in holding that the statute of limitations in malpractice actions against attorneys at law commences to run from the wrongful act charged to the defendant, rather than from the date of discovery or opportunity for discovery by the plaintiff-petitioner.

D. The learned Circuit Court erred in holding that plaintiff-petitioner was not the proper party to bring the malpractice action below.

E. By dismissing the Complaint and cause of action, the learned Circuit Court deprived plaintiff-petitioner of due process of law as guaranteed to him by the 14th Amendment to the Constitution of the United

States, section 1. prohibiting the several States from discriminatory denial of equal protection of the law, from deprivation of his right to prosecute a claim for compensation or damages for breach of contract, and from denial of lawful process against the defendant in common with others held answerable for civil wrongs.

F. The order and judgment dismissing plaintiff-petitioner's cause of action without trial on the merits deprives him arbitrarily and unconstitutionally of his right to trial by jury, as guaranteed to him by the 7th Amendment of the United States Constitution, as made applicable to the States by the 14th Amendment.

G. Unless review is granted to plaintiff-petitioner, and the arbitrary, unlawful and unconstitutional order and judgment of the learned Circuit Court of Cabell County is reversed, plaintiff-petitioner will have been denied due process of law.

WHEREFORE, plaintiff-petitioner respectfully prays that this Honorable Court will grant appeal or award writ of error to him, and that, upon review, this Honorable Court will reverse the order and judgment of the Circuit Court of Cabell County, and reinstate the cause of action, with procedendo.

Respectfully submitted,

STEPHEN P. MEYER, ESQ.
402 Charleston National Bank Bldg.
Charleston, West Virginia 25301

HARRY ALAN SHERMAN, ESQ.
186 Carlton House
Pittsburgh, Penna. 15219
BY HARRY ALAN SHERMAN
Attorneys for plaintiff-petr.

Note of Argument in Support of Petition of Plaintiff for a Writ of Error

STATEMENT OF FACTS

Defendant Kenneth Ater has not been served in the within action, because he is a resident of Ohio and beyond the jurisdiction of the Circuit Court below. It should be pointed out that he has been served in a companion action pending in the United States District Court For The Southern District Of Ohio, in Civil Action No. 6565. The said federal action is premised upon precisely the same complaint as is filed herein, both as to parties and averments. By his answer in the federal action, which was attached to plaintiff's brief opposing the motion to dismiss below, Ater therein places the onus of the omission resulting in the orders of dismissal of the wrongful death complaints upon defendant McVay. Moreover, Ater avers that McVay failed to notify Ater of the dismissals as well; leaving Ater to chance recent discovery thereof. Ater admits that even upon discovery he did not notify the plaintiff.

The fact that only McVay's appearance is entered upon the record in each of the dismissed Wayne County actions lends support to the affirmative assertions of Ater's answer. Copies of the certified record in the Wayne County action were likewise attached as "Pl. Ex. B" and "Pl. Ex. C" respectively, to plaintiff's brief below.

The position of the plaintiff is that the original lawyer consulted and retained in the wrongful death actions was Ater, who associated McVay for entering the cases. Ater never withdrew as such attorney, and

never notified plaintiff that he disassociated from McVay. Moreover, the selection of McVay as West Virginia counsel was solely the decision and act of Ater.

Obviously, without the answer of McVay to guide the Court or present counsel, it is impossible to rebut the answer of Ater in the federal proceeding. The Complaint was therefore lodged against McVay in the Court below; and the cause dismissed on defendant's motion, without further pleading or trial.

ARGUMENT

The modern rules of pleading are generally more liberal than those of a generation ago; and West Virginia is certainly in the vanguard of progress in this regard. Dismissal is to be avoided in favor of amendment where the latter is feasible; however, where the pleading states a cause based on averments which would sustain and support a verdict and judgment, factual answer is now generally required. Especially is this so since the adoption of procedures for summary judgment. It is the contention of the plaintiff that:

1. The complaint is sufficient.

2. The suit is timely.

3. The parties are proper.

4. The motion to dismiss should have been denied, or factual, responsive answer required.

In the alternative:

5. If more specific pleading were required, that plaintiff be permitted to amend the complaint.

I. THE COMPLAINT IS SUFFICIENT

"Because of the nature of the relation between an attorney and his client, the latter ordinarily has a choice of remedies in the case of negligence or misconduct upon the part of the former, to sue either in contract or in tort"; 1 C.J.S. Actions, par. 49 (10), p. 1126; Pratt v. Brewster, 52 Conn. 65; Houx v. Russell, 10 Mo. 246; Currey v. Butcher, 37 Or. 380; Pierce v. Wagner, 134 F 2d 958; Floro v. Lawton, 10 Cal. Repr. 98, 187 C.A. 2d 657 Wiodarek v. Thrift, 178 Md. 453; Weekley v. Knight, 156 So. 625; Hillhouse v. McDowell, 410 S. W. 2d 162, (1966).

In the case of O'Neill v. Gray, 30 F 2d 776, cert. den. 279 U. S. 865, an action for failure of the defendant attorney to prosecute a wrongful death action, as was similarly held that the client had a choice of remedy.

Obviously, if the complaint is sufficient as to either form of action, the motion to dismiss should have been denied.

The defendant correctly points out that there is no case specifically in point on the facts here asserted in the West Virginia decisions. Certainly there is no procedural rule as to malpractice actions, as distinguished from other tort or contract actions.

"As in the case of civil actions generally, the declaration, complaint or petition in an action against an attorney for negligence or wrongful act must allege facts sufficient to constitute a cause of action. . . However, in an action against an attorney for negligence it

may be sufficient for plaintiff to aver generally that defendant has been retained as attorney. . . . Further in actions based on negligence, a general averment thereof without a statement of specific facts is good as against a general demurrer. . . Further, in a client's action against an attorney for negligence in prosecuting a claim, he must allege facts sufficient to show that the client had a good cause of action against whom the claim was asserted"; 7 C.J.S. par. 157, Attorney and Client, (b) Pleading, pages 997, 998, 999; Schmitt v. McMillan, 162 N.Y.S. 437; 175 Ap. Div. 799; Hege v. Worthington, Park and Worthington, 26 Cal. Rep. 132; 208 C.A. 2d 670; Johnson v. Haskins, 119 S. W. 2d 235; Geltman v. Levy, 207 N. Y. S. 2d 366; Gross v. Eannace, 255 N. Y. S. 2d 625.

The complaint avers that the defendants were "employed by plaintiff in his representative capacity to enter a civil action or actions against one William J. Adkins for the wrongful deaths of Sandra Clark, deceased and Rebecca Clark, deceased, who were minors and guests in the Adkins automobile which was caused to crash into a concrete flood wall killing said decedents," . . . etc. It further alleges that two civil actions were in fact entered at 1133 and 1134 in the Circuit Court of Wayne County; that orders therein were entered dismissing said cases because of defendants' failure and neglect to process said cases.

It is respectfully submitted that this Honorable Court may and should take judicial cognizance of the records and judgments of the Wayne County Circuit Court. Copies of said records and judgments in the dismissed cases are now appended as "Pl.Ex.B" and "Pl.

Ex. C" to plaintiff's brief below. The orders constitute adjudications as to the non-compliance with the procedural rules resulting in the dismissals. Certainly, no clearer "good cause of action" can be made out prima facie as to the fault of the defendants.

Paragraph 12 of the complaint asserts that the plaintiff herein seeks "damages from the defendants in such sums as he would or could have recovered had the causes been properly processed by defendants, and for a like or other substantial sum as punitive damages . . ."

The gravamen of the complaint is thus quite clearly asserted. Proof remains for trial. Further, factual answer to the complaint by McVay may be quite helpful in directing the nature of such proof.

Certainly nothing can be gained by mere amendment of the complaint to assert the confidence of the plaintiff that the dismissed actions would have succeeded and that judgment therein would have been collected, since such averments can only be made on information and belief; however, no opportunity to amend to add such assertion was afforded plaintiff.

For the purpose of the present petition, it should be presumed that in accepting employment as attorneys for the prosecution of the wrongful death actions, and in entering said suits of record in the Wayne County Circuit Court records, the defendants themselves presumably represented said actions to be valid and meritorious.

"A lawyer may not be employed merely to serve a summons and do no more"; LEGAL ETHICS, Drinker, The

Lawyer's Obligation to the Courts, p. 80; nor may he "foist a fictitious controversy on the court"; p. 75; and note 24. It may assuredly be here also presumed that the defendants' actions in entering the wrongful death actions were in accord with the mandates of legal ethics.

In a case to the instant case, recently decided by the Supreme Court of Colorado, dismissal by the lower court was reversed; Rudd v. Rogerson, 152 Colo. 370, 381 P. 2d 995; 15 ALR 3d 668. The defendant attorney therein had failed to request a setting for trial as required by court rule because of his mistaken belief that the case would be automatically set for trial, and that he had been assured by the opposing attorney on the matter. The suit was treated as one in contract.

Since the entire record of the Wayne County Circuit Court is now before this Honorable Court, it should not be necessary that the specific averments of the wrongful death complaint be reasserted; however, it is clear that the defendant Adkins therein is charged with causing the deaths of the minors whose estates are represented by the plaintiff herein.

This case is to be distinguished from malpractice cases predicated upon a failure or neglect to file a suit, wherein no adjudication of the lawyer's negligence already on the court record as the basis of the malpractice action. In such cases, the complaint is the only source of information upon which a court may judge the sufficiency of the pleading; and such a complaint necessarily should spell out the facts clearly. Where, as here, the malpractice action is predicated upon record facts and previous adjudication thereon, it is respect-

fully submitted that less particularity is essential to state a sufficient "cause".

II. THE SUIT IS TIMELY

Since the cause may be treated as one in contract, the lesser statute of limitations applicable to trespass actions is not involved, as determined below.

While there is no prior case in point in the West Virginia decisions, the medical malpractice rule recently announced by the Supreme Court of the State in Hundley v. Martinez, 158 S. E. 2d 159; (Dec. 12, 1967) should be a dependable guide even as to tort cases brought after expiration of the statute, but within a reasonable period of time after discovery of the professional negligence, presuming "responsible diligence" in such discovery.

The answer of defendant Ater in the federal suit pending in the Ohio District Court shows that he, an experienced attorney, was unaware of the dismissal orders, and that defendant McVay had failed to inform him thereof. How then, could the plaintiff have known of the dismissals, without being informed by McVay?

It is the contention, however, of the plaintiff that the broader contract statute of limitations is here applicable. Accordingly, the suit is timely filed.

The Sixth Circuit Court of Appeals of the United States, in the recent case of Sitton v. Clements, 385 F 2d 869, has held that a malpractice action against an attorney is governed by the contract statute of limitation. Other cases similarly holding are Hillhouse v. McDowell, 410 S.W. 2d 162; O'Neill v. Gray, 30 F 2d 776, cert. den.

279 U. S. 865; Jackson v. Kemp, 365 S.W. 2d 437; 1 C.J.S. Actions, par. 49 (10), and cases cited under caption of argument I herein.

III. THE PARTIES ARE PROPER

This is not a wrongful death action, even though the nature of proof and damages necessarily will be the same.

It was precisely the same distinction which had to be drawn by the court in O'Neill v. Gray, supra. Malpractice in the negligent handling of a death action was held to be a distinct cause both as to form and substance, the death action being one of tort controlled by the rules applicable thereto, and the malpractice action being one of contract, and subject to the rules governing such actions. The employment of the defendants was a contract with the plaintiff herein. Although the plaintiff will be held accountable eventually to the respective estates of the decedents he represents, the recovery herein need not be otherwise than to the plaintiff as administrator.

CONCLUSION

WHEREFORE, it is respectfully submitted that:

(a) the motion to dismiss should have been denied, and

(b) defendant McVay should have been required to answer the complaint,

IN THE ALTERNATIVE, if the learned Circuit Court should have been of the opinion that the complaint should be amended, that leave to do so promptly should have been given to plaintiff.

(c) the order below should be reversed, with a procedendo.

Respectfully submitted,

STEPH. P. MEYER, ESQ., and
HARRY ALAN SHERMAN, Esq.,
BY HARRY ALAN SHERMAN
Attorneys for Plaintiff